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Constitutional Law - Eighth Amendment - Capital Punishment - Proportionality Review

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CONSTITUTIONAL LAW—EIGHTH AMENDMENT—CAPITAL PUNISHMENT —PROPORTIONALITY REVIEW—In the first case to be decided under the 1978 death penalty bill the Pennsylvania Supreme Court held that the death penalty statute does not violate the federal or state constitutions.

Commonwealth v. Zettlemoyer, ____ Pa. ____, 454 A.2d 937 (1982), *cert. denied*, 103 S. Ct. 2444 (1983).*

On April 24, 1981 Keith Zettlemoyer, following a bifurcated jury trial, was convicted of murder of the first degree and sentenced to death for the shooting and killing of Charles DeVetsco.[1] Zettlemoyer had been arrested by the police on October 13, 1980 as he emerged from an isolated dumping area carrying a .357 magnum Smith and Wesson revolver in one hand and a flashlight in the other.[2] After retracing Zettlemoyer's path, the officers discovered the body of Charles DeVetsco.[3] Evidence introduced at the trial established that Zettlemoyer and DeVetsco had previously worked together in a retail store[4] and that DeVetsco intended to testify against Zettlemoyer at an upcoming trial.[5]

Justice Larsen, writing for the majority,[6] first considered

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* Due to the unavailability of the *Zettlemoyer* opinion in the PENNSYLVANIA STATE REPORTS at the time of publication, citations to this reporter have been omitted.

1. Commonwealth v. Zettlemoyer, 454 A.2d 937 (1982), *cert. denied*, 103 S. Ct. 2444 (1983). The victim was shot twice in the neck with a .22 caliber weapon and twice in the back with a .357 magnum. Cause of death was attributed to the .357 magnum bullets penetrating through DeVetsco's back causing hemorrhaging of the heart. 454 A.2d at 942.

2. 454 A.2d at 942. While on routine patrol, the officers heard two shots fired and investigated the dumping area nearby. When Zettlemoyer was ordered out of the surrounding bushes, he appeared dressed in dark clothing, including dark gloves. Heavily armed, he claimed to have been shooting rats. *Id.* at 941-42.

3. *Id.* at 941. Evidence found in a van parked in front of the bushes, including two spent .22 caliber bullet casings, blood soaked items, and the .22 caliber weapon, all indicated that the victim was first shot while in the van and then dragged into the woods where he was subsequently shot and killed with the .357 revolver. *Id.* at 942.

4. *Id.* at 942. Mrs. Donna Zettlemoyer testified that her son and DeVetsco had been friends. *Id.* at 951.

5. *Id.* at 942. On May 26, 1980, Zettlemoyer was indicted by a Snyder County grand jury on seven felony counts, all relating to the armed robbery of a Radio Shack and the kidnapping of its owner. *Id.* at 955 n.20. On October 6, 1980, during jury selection for the trial which was scheduled to begin October 21, 1980, Zettlemoyer first learned of the Commonwealth's intention to call DeVetsco as a witness against him. *Id.* at 942. Justice Larsen stated, in error, that these events occurred in 1981. *See id.* at 955 n.20.

6. Justice Larsen was joined by Justices Flaherty, McDermott, and Hutchinson. Justice Roberts filed a dissenting opinion, joined by Chief Justice O'Brien. Justice Nix also filed

whether the evidence was sufficient to support a conviction of first degree murder beyond a reasonable doubt.[7] He pointed out that Zettlemoyer admitted general culpability, but, by presenting evidence of diminished capacity, attempted to reduce the offense from first to third degree murder.[8]

The defense of diminished capacity, Justice Larsen explained, was first recognized in Pennsylvania in *Commonwealth v. Walzack*.[9] He emphasized that the *Walzack* defense, as clarified in *Commonwealth v. Weinstein*,[10] is applicable only if the mental defect of disease affects the cognitive functioning of the brain.[11] Zettlemoyer, in contrast, presented expert testimony of a schizoid personality with paranoid features which, as Justice Larsen pointed out, was irrelevant to Zettlemoyer's capacity to commit murder intentionally.[12]

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a dissenting opinion.

7. *Id.* at 941-42. The Pennsylvania sentencing procedure for murder of the first degree requires automatic review by the Supreme Court of Pennsylvania when a death sentence is imposed. *See* 42 PA. CONS. STAT. § 9711(h) (1982), *infra* note 51. Justice Larsen noted that regardless of whether the sufficiency of the evidence is raised on appeal, § 9711(h) requires the court to consider the issue in cases where the death penalty is imposed. In addition, the court must determine that the evidence is sufficient to support each aggravating circumstance found, and that the sentence is not excessive in comparison to similar cases. 454 A.2d at 942 n.3.

8. 454 A.2d at 942.

9. *Id. See* 468 Pa. 210, 360 A.2d 914 (1976). In *Walzack*, Justice Larsen observed, psychiatric evidence of a prefrontal lobotomy was admitted to negate the mens rea required for a finding of first degree murder. 454 A.2d at 943. *See* 468 Pa. at 220-21, 360 A.2d at 919.

10. 451 A.2d 1344 (Pa. 1982).

11. 454 A.2d at 943. In *Weinstein*, the court held that psychiatric testimony directed not at a defendant's ability to plan, deliberate, and premeditate, but rather, as evidence relating to an irresistible impulse or inability to control oneself is irrelevant and inadmissible. 451 A.2d at 1347. The *Weinstein* court reiterated that the M'Naughton test is the sole standard for determining legal insanity in Pennsylvania. *Id.* Justice Larsen pointed out that under *Weinstein*, "*Walzack* stands only for the proposition that 'psychiatric testimony which speaks to the legislatively defined state of mind encompassing a specific intent to kill is admissible.'" 454 A.2d at 943 (quoting *Weinstein*, 451 A.2d at 1347).

12. 454 A.2d at 943. Justice Larsen found that the testimony of nine lay witnesses, including Zettlemoyer's mother and grandmother, who described Zettlemoyer's behavior before and after the killing, also had no bearing on the element of specific intent to kill. 454 A.2d at 945. Zettlemoyer had argued that evidence of personality disorders to prove diminished capacity was approved in Commonwealth v. Sourbeer, 492 Pa. 17, 422 A.2d 116 (1980) and Commonwealth v. Brantner, 486 Pa. 518, 406 A.2d 1011 (1979). Justice Larsen explained that the use of psychiatric evidence in those cases was not approved but merely affirmed as not affecting the outcome in either case. 454 A.2d at 944.

Justice Larsen also reviewed the lower court's charge on diminished capacity to determine whether the jury was instructed correctly. *Id.* at 947. He concluded that the trial court had explained each of the terms that were used and had portrayed Zettlemoyer's defense exactly as it had been offered by the witnesses at trial. *Id.* at 948. Justice Larsen further approved the court's charge for informing the jury of which facts were relevant to the defense of

Justice Larsen then proceeded to review the validity of the sentence of death imposed on Zettlemoyer.[13] He explained that in response to the United States Supreme Court's decision in *Furman v. Georgia,*[14] the Pennsylvania Supreme Court struck down Pennsylvania's death penalty statute in *Commonwealth v. Bradley.*[15] The legislature's first attempt to comply with the *Furman* and *Bradley* decisions was also subsequently invalidated by the Pennsylvania Supreme Court.[16] Justice Larsen noted that Zettlemoyer was sentenced pursuant to the most recently enacted sentencing procedures for murder of the first degree.[17]

Justice Larsen explained that the current sentencing procedure retained the split-verdict provision which provides that, following a verdict of murder of the first degree, a separate sentencing hearing is held before the same jury that determined guilt.[18] He pointed out that the trial court must instruct the jury on the legislatively enumerated aggravating circumstances, the possible mitigating circumstances, the burden of proof required and the weighing process which the jury should use to determine the appropriate penalty.[19]

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diminished capacity. *Id.* at 949.

13. *Id.* Justice Larsen stated that the court, required by statute to review all sentences of death, would affirm the penalty imposed unless it was the result of passion, prejudice, or any other arbitrary factor, the evidence failed to support the finding of an aggravating circumstance, or the sentence was excessive in comparison to similar cases. *Id.* at 951. *See* 42 PA. CONS. STAT. § 9711(h), *infra* note 41.

14. 408 U.S. 238 (1972). *See infra* note 81.

15. 454 A.2d at 949. *See* 449 Pa. 19, 295 A.2d 842 (1972) (death sentence imposed pursuant to 1939 Pennsylvania statute was vacated in light of *Furman v. Georgia,* 408 U.S. 238 (1972), as violative of eighth and fourteenth amendments).

16. 454 A.2d at 949. *See* Commonwealth v. Moody, 476 Pa. 223, 382 A.2d 442 (1977), *cert. denied,* 438 U.S. 914 (1978). The 1974 statute included provisions channeling the sentencer's discretion in an attempt to avoid the arbitrariness identified in *Furman,* but fatally limited the sentencer's consideration of mitigating circumstances. *See* 1974 Pa. Laws 213.

17. 454 A.2d at 950. *See* 42 PA. CONS. STAT. § 9711 (1982).

18. 454 A.2d at 950. During the sentencing phase of the trial both sides may present arguments and additional evidence. *Id.*

19. *Id.* at 950-51. *See* 42 PA. CONS. STAT. § 9711(c)(1) which provides:

> (1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:
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> (i) the aggravating circumstances specified in subsection (d) as to which there is some evidence.
>
> (ii) the mitigating circumstances specified in subsection (e) as to which there is some evidence.
>
> (iii) aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.
>
> (iv) the verdict must be a sentence of death if the jury unanimously finds at

Prior to his review of the constitutional questions, Justice Larsen first considered the validity of the sentence imposed on Zettlemoyer.[20] During trial, the only aggravating circumstance sought to be proved, and subsequently found by the jury, was that DeVetsco was a prosecution witness to a felony committed by the defendant and that DeVetsco was killed to prevent his testimony; Justice Larsen found that there was sufficient circumstantial evidence, required in the absence of an admission by the defendant, to support overwhelmingly the jury's finding.[21]

The majority rejected the appellant's argument that the language used in section 9711(d)(5) of the sentencing code[22] should be interpreted as requiring that the victim actually be an eyewitness to the crime about which he was to testify.[23] The majority believed that the appellant's interpretation was illogical and inconsistent with the legislative intent of preserving the viability of the criminal justice system.[24] Thus, the majority held that, although relying on circumstantial evidence, the Commonwealth had sustained its burden of proving the aggravating circumstance beyond a reasona-

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least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

(v) the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.

Id.

20. 454 A.2d at 951.

21. *Id.* Zettlemoyer had argued that the Commonwealth did not meet its burden of proving that the reason for the killing was to prevent DeVetsco's testimony. *Id.* Zettlemoyer contended that testimony by his mother noting the previous friendly relationship between the two men suggested other possible motives. *Id. See infra* note 22.

22. *See* 42 PA. CONS. STAT. § 9711(d)(5). Section 9711(d) limits the jury's consideration to ten enumerated aggravating circumstances. Subsection (5) provides: "The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses." *Id.*

23. 454 A.2d at 952. The victim was not present when Zettlemoyer allegedly committed the felony. *Id.*

24. *Id.* Justice Larsen stated that "[s]uch an interpretation defied logic, common sense, the plain and unambiguous meaning of the statute, and the obvious intention of the drafters who quite clearly were concerned with the type of frontal assault upon the criminal justice system as is presented by this case." *Id.* Justice Larsen also rejected Zettlemoyer's claim that his guilt of the collateral offense must be proved before the aggravating circumstance could be charged, and reasoned that if this interpretation were accepted, the defendant, by his very act of murder could prevent the Commonwealth from ever proving the collateral offense. *Id.*

ble doubt.[25]

Justice Larsen next reviewed the trial court's jury instructions regarding the weighing of aggravating circumstances and mitigating circumstances.[26] Zettlemoyer had maintained that the trial judge erred by instructing the jury that a verdict of life imprisonment must be rendered if no aggravating circumstance was found or if the mitigating circumstances outweighed the aggravating circumstances.[27] Justice Larsen determined that any potential error was cured by the trial court's subsequent instructions given in response to Zettlemoyer's objections which informed the jury that a sentence of death required either that there be no mitigating circumstance or that the aggravating circumstances must outweigh mitigating circumstances.[28]

In addition to other trial errors alleged by Zettlemoyer,[29] Justice Larsen considered whether a mistrial should have been granted because in his closing, the district attorney had told the jury that it should consider the deterrent effect of the death penalty in reaching a decision.[30] Justice Larsen first analyzed the prosecutor's clos-

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25. 454 A.2d at 951-53. Justice Larsen emphasized that "[t]he Commonwealth is not required to negate every conceivable inference within the endless realm of human speculation that is consistent with innocence." *Id.* at 952.

26. *Id.* at 953.

27. *Id. See supra* note 19.

28. 454 A.2d at 954. Justice Larsen stated that "it does seem that the charge was technically incorrect in part," but concluded that the charge, as given, merely revealed a "slight lacuna" which would present a problem only if the jury considered the aggravating circumstances to equal the mitigating circumstances exactly. *Id.* at 954 and n.18. Justice Larsen explained that the verdict slip which went out with the jury stated the correct statutory requirements for a sentence of death and that the trial court was not required to charge the jury specifically that mitigating circumstances need not outweigh aggravating circumstances. *Id.* at 954-55. *See* Commonwealth v. Lesher, 473 Pa. 141, 373 A.2d 1088 (1977) (the only issue is whether subject area is adequately, accurately, and clearly presented to the jury).

29. 454 A.2d at 955-56. Justice Larsen addressed Zettlemoyer's contention that the trial court erred by permitting the district attorney to read the felony indictments from the collateral proceedings in Snyder County. Justice Larsen affirmed the reading of the offenses charged partly because the contents were verbalized in a neutral and unimpassioned tone and additionally because the trial judge informed the jury of its limited evidentiary purpose. Justice Larsen also relied on the fact that the jury had been made aware of the seriousness of the charges by other evidence presented at the guilt stage of the trial. *Id.*

30. *Id.* at 957. The district attorney had stated:

> You, as the jury, have a right to consider what effect your decision as to the penalty we impose on Mr. Zettlemoyer, what place the deterrent effect should play in that decision and I submit to you it is a very important one and it is a very crucial one.

Id. Defense counsel had objected, stating that according to the law, the jury may consider only statutory aggravating circumstances. *Id.* Justice Larsen observed that Zettlemoyer had argued in his appeal that the district attorney introduced an unproven fact into his argument. *Id.*

ing argument to determine whether it had biased the jury in its weighing of the evidence.[31] Justice Larsen did not dispute the fact that the deterrent effect of the death penalty had never been proven,[32] but construed the sentencing code to permit both counsel to freely argue their respective positions to the jury.[33] After examining the record, Justice Larsen determined that neither the prosecutor's remark nor any other factor had resulted in a sentence based on passion or prejudice.[34]

In his constitutional analysis of the sentencing code, Justice Larsen focused initially on the charges made in response to *Commonwealth v. Moody*[35] and *Lockett v. Ohio*.[36] He observed that the Pennsylvania legislature created a wide range of seven fairly specific mitigating circumstances, and a provision which allows for the introduction of virtually any mitigating circumstances, thus giving the sentencer the required latitude.[37] Justice Larsen further noted

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31. *Id.* Justice Larsen compared the district attorney's remarks in the instant case with other cases in which improper prosecutorial advocacy had been an issue on appeal. He made it clear that the court's philosophy is that the district attorney must have "reasonable latitude in fairly presenting its case to the jury." *Id. See, e.g.*, Commonwealth v. Brown, 489 Pa. 285, 414 A.2d 70 (1980) (no bias was found just because the district attorney told the jury erroneously that defense counsel had been a prosecutor); Commonwealth v. Van Cliff, 483 Pa. 576, 397 A.2d 1173 (1979) (curative instruction may have been warranted, but no abuse of discretion in overlooking single reference to defendant as a criminal). *But see* Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155 (1978) (evidence of murder victim's family status was irrelevant and prejudicial).

32. 454 A.2d at 957-58. "[D]espite the Herculean efforts of lawmakers, scholars, and sociologists to prove whether the death penalty has, in fact, any significant deterrent effect, no conclusive proof has been forthcoming." *Id.* at 957 (quoting Gregg v. Georgia, 428 U.S. 153, 233-34 (1976) (Marshall, J., dissenting)).

33. 454 A.2d at 958. *See* 42 PA. CONS. STAT. § 9711(a)(3) (1982) which provides: "After the presentation of evidence, the court shall permit counsel to present argument for or against the sentence of death." *Id.* Justice Larsen pointed out that the deterrent effect was discussed only briefly and only as it applied in the context of a calculated execution. 454 A.2d at 958. Justice Larsen found support in the Supreme Court's decision in *Gregg*, 428 U.S. at 186-87, where Justice Stewart stated that despite the lack of statistical data supporting or refuting the "deterrence" of the death penalty, there are many would-be murderers for whom "the death penalty undoubtedly is a significant deterrent." *Id.*

34. 454 A.2d at 958.

35. 476 Pa. 223, 237, 383 A.2d 442, 447 (1977), *cert. denied*, 438 U.S. 914 (1978) (sentencing authority must be allowed to consider whatever mitigating evidence relevant to his character and record the defendant can present). *See supra* note 16.

36. 438 U.S. 586, 604 (1978) (a death penalty statute may not preclude the sentencer from considering a wide range of mitigating factors relevant to the character of the defendant and the circumstances of the offense).

37. 454 A.2d at 958-59. *See* 42 PA. CONS. STAT. § 9711(e) (1982). The statute provides that mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal convictions.

(2) The defendant was under the influence of extreme mental or emotional

that legislative enactments are presumptively constitutional and will not be disturbed unless the enactment is clearly in violation of a specific constitutional mandate or prohibition.[38] He explained that the doctrine of separation-of-powers gives the legislature the authority to determine punishable offenses and appropriate penalties.[39] Thus, according to Justice Larsen, a legislative decision that the offense of murder in some clearly defined instances may be punishable by death would not be disturbed unless the offender could prove that constitutional boundaries had been overstepped.[40]

Justice Larsen next assessed the statutory provisions for appellate review.[41] He noted that in order for a death penalty statute to

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disturbance.

(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(4) The age of the defendant at the time of the crime.

(5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa. C.S. § 309 (relating to duress), or acted under the substantial domination of another person.

(6) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.

(7) The defendant's participation in the homicidal act was relatively minor.

(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

Id.

38. 454 A.2d at 959 (citing Snider v. Thornburg, 496 Pa. 159, 436 A.2d 593 (1981)). According to Justice Larsen, as long as the jury's discretion is channeled, and focuses on the particular crime and offender, thus enabling meaningful appellate review, the statute meets the requirements of *Gregg*. 454 A.2d at 959.

39. 454 A.2d at 959-60. Justice Larsen stated that the judicial role is to remain neutral while it is the legislature's duty to reflect the consensus of the community. Justice Larsen found support in Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring) where Justice Frankfurter pointed out that "[h]istory teaches us that the independence of the judiciary is jeopardized when courts become embroiled in the passions fo the day . . . ." 454 A.2d at 959-60.

40. 454 A.2d at 960.

41. *Id.* at 960. *See* 43 PA. CONS. STAT. § 9711(h) (1982). The statute provides:

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence.

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;

(ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or

(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

Id.

be constitutional, the United States Supreme Court requires meaningful review by a court with statewide jurisdiction; he emphasized that the Pennsylvania court does not take its statutory duty lightly.[42] He explained that, as required by law,[43] the court conducted an independent evaluation and compared the circumstances of the crime and the character and record of the defendant with all similar cases decided since the enactment of the sentencing code.[44] Justice Larsen found only one other case[45] in which the prosecution witness had been the victim, and noted that defendant had also received a sentence of death.[46] Justice Larsen concluded that Zettlemoyer's sentence was not comparatively excessive or

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42. 454 A.2d at 960-61. Justice Larsen stressed that the United States Supreme Court does not require that any particular procedure be followed, and that no death penalty statute has been struck down on the grounds of inadequate review. *Id.* (citing Proffitt v. Florida, 428 U.S. 242 (1976)).

43. *See* 42 PA. CONS. STAT. § 9711(h)(3)(iii) (1982), *supra* note 41.

44. 454 A.2d at 961. The effective date of the new sentencing code was September 13, 1978. *Id.*

45. Justice Larsen noted that the case used for comparative review, Commonwealth v. Truesdale, was docketed on appeal at No. 81-3-483, but had not been decided by the court. In *Truesdale,* the defendant was convicted of killing a person who had witnessed the murder of another Truesdale victim. The jury in imposing the death penalty found three aggravating circumstances and no mitigating circumstances. 454 A.2d at 962 n.26a. Aggravating circumstances which juries may consider are enumerated in 42 PA. CONS. STAT. § 9711(d) (1982):

> (1) The victim was a fireman, peace officer or public servant concerned in official detention as defined in 18 Pa. C.S. § 5121 (relating to escape), who was killed in the performance of his duties.
>
> (2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or has conspired to pay or be paid by another person for the killing of the victim.
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> (3) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.
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> (4) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.
>
> (5) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.
>
> (6) The defendant committed a killing while in the perpetration of a felony.
>
> (7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.
>
> (8) The offense was committed by means of torture.
>
> (9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.
>
> (10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

Id. In *Truesdale* the jury found (d)(5), (d)(7), and (d)(10). 454 A.2d at 962 n.26a.

46. 454 A.2d at 962.

disproportionate to the sentence imposed in similar cases.[47] In addition, Justice Larsen determined that the court was able to review the mitigating evidence presented by Zettlemoyer without having to poll the jury to determine which mitigating circumstances it found during its deliberations.[48]

Another issue raised by Zettlemoyer and reviewed by Justice Larsen concerned a provision of the sentencing code which places the burden of proving a mitigating circumstance on the defendant.[49] Zettlemoyer had maintained that this provision was a violation of the due process clause of the fifth and fourteenth amendments to the United States Constitution.[50] Justice Larsen compared allocating to the defendant the burden of proving a mitigating circumstance to that of proving an affirmative defense, noting that the latter was upheld by the Supreme Court in *Patterson v. New York*.[51] Justice Larsen concluded that the statutory provision does not violate due process.[52]

The majority also rejected Zettlemoyer's constitutional argument that the sentencing code is impermissively vague and provides no standard for determining whether aggravating circumstances outweigh mitigating circumstances.[53] The majority stated that there was no constitutional basis for this argument and that the court

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47. *Id.*

48. *Id.* Zettlemoyer argued at trial that a lack of written findings would impair proper appellate review. Justice Larsen stated that the trial court did not abuse its discretion in rejecting Zettlemoyer's request to poll the jury as to which mitigating circumstances it had found. *Id.*

49. *Id. See* 42 PA. CONS. STAT. § 9711(c)(1)(iii) (1982) which provides that the jury be instructed that "aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence." *Id.*

50. 454 A.2d at 962. Zettlemoyer emphasized that the due process clause protects "the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* (quoting *In re* Winship, 397 U.S. 358, 364 (1970)). In rejecting this argument, Justice Larsen noted that the Commonwealth retains the burden of proving, beyond a reasonable doubt, both the guilt of the defendant and the existence of an aggravating circumstance. 454 A.2d at 963.

51. 454 A.2d at 962-63. *See* 432 U.S. 358 (1970). Justice Larsen pointed out that in *Patterson* the United States Supreme Court found that the burden of proving an intentional killing beyond a reasonable doubt remains with the state, but the defendant could reduce the offense to manslaughter by persuading the jury that he was under the influence of extreme emotional disturbance. 454 A.2d at 962-63. Justice Larsen also found support in *Moody* where the court stated that "the sentencing authority be allowed to consider whatever mitigating evidence relevant to his character and record *the defendant* can present." *Id.* at 963 (quoting Commonwealth v. Moody, 476 Pa. at 237, 382 A.2d at 449 (emphasis provided)).

52. 454 A.2d at 963.

53. *Id. See* 42 PA. CONS. STAT. § 9711(c)(1)(iv) (1982), *supra* note 19.

would not tamper with the legislature's judgment.[54]

Justice Larsen next considered and rejected Zettlemoyer's contention that the Pennsylvania practice of charging the jury on voluntary manslaughter, even where there was no evidence presented to support such a verdict, introduced the possibility of arbitrary and capricious sentencing by the jury.[55] After a detailed discussion of the procedure in Pennsylvania, Justice Larsen noted that the court's review for excessiveness and proportionality did not encompass any cases in which a charge on voluntary manslaughter had been given.[56] Justice Larsen reserved a final disposition of this issue to a more appropriate case.[57]

The majority than addressed Zettlemoyer's final argument that imposing the death penalty was per se a cruel form of punishment prohibited by the Pennsylvania Constitution.[58] Zettlemoyer requested that article I, section 13 of the Pennsylvania Constitution be given a broader interpretation than its federal counterpart,[59] but the majority held that the right to be protected in Pennsylvania from cruel punishment is co-extensive with that secured by the United States Constitution.[60] The majority further emphasized that while eighth amendment interpretation does not remain static, the legislature discerns contemporary standards of decency and prescribes the standards upon which the constitutional test is

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54. 454 A.2d at 963. Justice Larsen, observing that the United States Supreme Court rejected a similar argument in *Proffitt*, concluded that "the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant . . . ." *Id.* (quoting Proffitt v. Florida, 428 U.S. 242, 257-58 (1976)). The *Proffitt* Court, Justice Larsen noted, compared the weighing process to traditionally difficult decisions required of the fact finder. 454 A.2d at 963-64.

55. 454 A.2d at 964. The NAACP as amicus curiae relied on the United States Supreme Court's decision in Roberts v. Louisiana, 428 U.S. 325 (1976), and argued that jury instructions on lesser degrees of murder and voluntary manslaughter invite the jury to disregard its oath whenever it feels a death sentence is inappropriate 454 A.2d at 964. Justice Larsen, distinguishing the Pennsylvania and Louisiana statutes, emphasized that under the Louisiana Statute at issue in *Roberts*, a verdict of death was mandatory following a verdict of first-degree murder and, in addition, the Louisiana statute provided no sentencing guidelines and no provision for appellate review. 454 A.2d at 965-66.

56. 454 A.2d at 966.

57. *Id.*

58. *Id.* at 967. *See* PA. CONST. art. I, § 13 which provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

59. *See* U.S. CONST. amend. VIII which provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

60. 454 A.2d at 967. Justice Larsen observed that the Court in *Gregg* held that capital punishment does not violate the eighth amendment to the United States Constitution. *Id.*

based.[61] The majority concluded that the death penalty is not cruel punishment and that the procedures set forth in section 9711 of the sentencing code are constitutionally permissible.[62]

Justice Roberts, writing in dissent,[63] agreed with the verdict of guilt but disagreed with the judgment of sentence.[64] Justice Roberts believed that the Commonwealth had not met its burden of proving that any statutory aggravating circumstances existed,[65] and that the effectiveness of trial counsel had been neither challenged nor reviewed.[66]

Justice Roberts observed that at least one mitigating circumstance was present.[67] The major flaw that Justice Roberts perceived with the aggravating circumstance utilized, was that the Commonwealth had merely proved that DeVetsco planned to testify as a prosecution witness, but had offered no additional evidence to satisfy the statutory requirement that he be a witness to a murder or other felony.[68] Justice Roberts pointed out that the Commonwealth had only established Zettlemoyer's motive for killing DeVetsco, but that the language in the statute requires that the nature of the witness's testimony also be proven.[69] He did not

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61. *Id.* at 968 (quoting Commonwealth v. Story, 497 Pa. 273, 297, 440 A.2d 488, 500 (1982) (Larsen, J., dissenting) ("In considering such an emotionally charged, controversial and polarizing issue such as the death penalty, the legislature is peculiarly well-adapted to respond to the consensus of the people in this Commonwealth")). Justice Larsen emphasized that the legislature of Pennsylvania has consistently and continually prescribed the penalty of death for at least some intentional killings and, furthermore, after the judicial invalidation of a death penalty statute the legislature promptly enacted a new law. 454 A.2d at 969.

62. 454 A.2d at 969.

63. *Id.* (Roberts, J., dissenting). Justice Roberts was joined by Chief Justice O'Brien.

64. *Id.*

65. *See supra* note 20 and accompanying text.

66. 454 A.2d at 969 (Roberts, J., dissenting). Justice Roberts discussed each of these issues separately and observed that a sentence of death may preclude an appropriate remedy provided by the Post-Conviction Hearing Act. *Id. See* 42 PA. CONS. STAT. §9711(i) (1982) which provides that if a sentence of death is upheld, the court is required to transmit the record to the Governor. *Id.*

67. 454 A.2d at 969 (Roberts, J., dissenting). Both parties agreed that "the defendant had no significant history of prior criminal convictions." *Id. See* 42 PA. CONS. STAT. § 9711(e)(1) (1982). *See also supra* note 37 for a complete list of statutory mitigating circumstances.

68. 454 A.2d at 969-70 (Roberts, J., dissenting). *See supra* notes 22-24 and accompanying text. Under the majority's interpretation of § 9711(d)(5), according to Justice Roberts, "all but the word 'prosecution' has been rendered mere surplusage." 454 A.2d at 970 (Roberts, J., dissenting).

69. 454 A.2d at 970 (Roberts, J., dissenting). Justice Roberts argued that under the majority's interpretation, any witness, including an expert witness in a felony case, would fall within the scope of § 9711(d)(5). 454 A.2d at 970 (Roberts, J., dissenting).

decide whether the statutory language also requires that the witness be an eyewitness to the felony, since he believed that the Commonwealth failed to satisfy the other elements required by section 9711(d)(5).[70]

Justice Roberts then pointed out that the death penalty statute includes no provision for a judicial determination of whether Zettlemoyer had been afforded his constitutional right to the effective assistance of trial counsel.[71] He suggested that the issue of effectiveness of counsel could be addressed during appellate review, but noted the deficiencies inherent in this method, including an incomplete record and inability to second-guess trial strategies.[72] Justice Roberts concluded that without a hearing on the effectiveness of Zettlemoyer's trial counsel, the court's statutory duty to provide meaningful appellate review had not been fully discharged.[73]

Justice Nix, also dissenting from the judgment of sentence, stated that while he supported the sanction of capital punishment, he disagreed with the majority's scrutiny of the proceedings below.[74] Justice Nix believed that the statute is deficient because it fails to establish a standard for weighing aggravating and mitigating circumstances, and pointed out that the majority failed to address this issue.[75] He further stated that Zettlemoyer's judgment should not stand because it was not apparent from the face of the

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70. 454 A.2d at 970 (Roberts, J., dissenting).

71. *Id.* at 970-71 (Roberts, J., dissenting). Zettlemoyer was represented by the Public Defender of Dauphin County at trial and on appeal. *Id.* at 970. Justice Roberts emphasized that there was no guarantee of federal review occurring prior to imposition of the death sentence. He noted several possible errors in the presentation of Zettlemoyer's defense and stated that an evidentiary hearing was necessary in order to determine whether counsel's choice of strategy was justified. *Id.* Justice Roberts noted that defense counsel did not present factual evidence disputing the Commonwealth's theory of Zettlemoyer's motive for killing DeVetsco, despite some evidence that Zettlemoyer may have robbed the victim. *Id.* at 970-71 (Roberts, J., dissenting).

72. *Id.* at 970-71 (Roberts, J., dissenting). Justice Roberts explained that a search of the record may only disclose "plain and fundamental error," a doctrine no longer followed in Pennsylvania. *Id.* at 971 (Roberts, J., dissenting). *See* Commonwealth v. Clair, 458 Pa. 418, 326 A.2d 272 (1974) (abrogating the doctrine of "plain and fundamental error" on the basis of its uneven results and inefficiency).

73. 454 A.2d at 971 (Roberts, J., dissenting).

74. 454 A.2d at 971 (Nix, J., dissenting). Justice Nix emphasized that "the utilization of this sanction imposes upon the judicial system the responsibility to scrupulously oversee its use . . . ." *Id.*

75. *Id.* at 972 (Nix, J., dissenting). Justice Nix observed that not only does the statute fail to express any such standard, "the majority implicitly suggests that the scale can be tipped in favor of death by a scintilla of weight." *Id. See* 42 PA. CONS. STAT. § 9711(c)(iv) (1982). *See also supra* note 19 for the text of the jury instructions.

record that the fact finder had the proper standard before it.[76] Justice Nix further stated that the ambiguity resulting from the erroneous jury instruction was of even greater significance since the trial court had failed to clarify the legislative standard to be applied in deciding on a life or death sentence.[77] He believed that additional instructions, characterized as curative by the majority,[78] were neither corrective nor curative and suggested that the trial judge was remiss in refusing to instruct the jury that the mitigating circumstances need not outweigh the aggravating circumstances.[79] Justice Nix concluded by criticizing the majority for failing to scrutinize the record adequately and for presuming an absence of harmful error in the charge as given to the jury.[80]

Upon a reading of the court's opinion in *Zettlemoyer,* meaningful appellate review stands out as, perhaps, the most important procedural safeguard available to a defendant facing a sentence of death. In order to evaluate the adequacy of the review afforded Keith Zettlemoyer, it is first necessary to consider the standard impliedly mandated by the United States Constitution as it has been interpreted by the United States Supreme Court.

In response to *Furman v. Georgia,*[81] the legislatures of thirty-five states, including Pennsylvania,[82] passed new legislation authorizing capital punishment for a limited class of defendants.[83] On July 2, 1976, the United States Supreme Court ruled on the constitutionality of death penalty statutes enacted in five of those states.[84] Of these five, the Court struck down the mandatory sentencing laws of Louisiana and North Carolina, but upheld the sentences of death imposed pursuant to the Georgia, Florida, and Texas enact-

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76. 454 A.2d at 972 (Nix, J., dissenting).

77. *Id.* Justice Nix observed that in addition to the statutory inadequacy in establishing a burden of proof for the weighing process, the trial court further confused the legal principles by giving contradictory directives. *Id.*

78. *See id.* at 954.

79. *Id.* at 972 (Nix, J., dissenting). Justice Nix pointed to other non-capital cases where new trials were granted on the basis of inadequate, unclear, or misleading charges. *Id. See, e.g.,* Commonwealth v. Wortham, 471 Pa. 243, 369 A.2d 1287 (1977).

80. 454 A.2d at 972 (Nix, J., dissenting).

81. 408 U.S. 238 (1972) (per curiam). *Furman* held that a death penalty statute that gives the jury untrammeled sentencing discretion violates the eighth and fourteenth amendments to the United States Constitution. *Id.* at 239-40.

82. *See* 1974 Pa. Laws 214.

83. *See* Gregg v. Georgia, 428 U.S. 153, 179 and n.23 (1976) (legislative response of 35 states indicative of society's endorsement of the death penalty for murder).

84. *See* Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 2442 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

ments.[85] In addition to affirming the statutory procedures channeling the guided discretion of sentencing authorities,[86] in each of the opinions a plurality of the Court identified meaningful appellate review as a significant safeguard against the arbitrary and capricious imposition of death sentences.[87] As Justice Larsen pointed out in *Zettlemoyer*,[88] no specific mechanism for implementing a reliable reviewing procedure was mandated by the plurality in 1976, but essential elements of appellate review were identified and substantial compliance by state appellate courts was expected.[89]

The case most often relied on for guidance on the issue of appellate review is *Gregg v. Georgia*,[90] where the role of the reviewing court was closely scrutinized. The Georgia model for appellate review was unquestionably approved in the joint opinion authored by Justice Stewart,[91] and in Justice White's concurring opinion.[92]

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85. *See* Roberts v. Louisiana, 428 U.S. 325, 336 (1976) ("death sentence imposed upon the petitioner under Louisiana's mandatory death sentence statute violates the Eighth and Fourteenth Amendments"); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("death sentences imposed upon the petitioners under North Carolina's mandatory sentence statute violated the Eighth and Fourteenth Amendments"); Jurek v. Texas, 428 U.S. 262, 276 (1976) ("Texas' capital-sentencing procedures, like those of Georgia and Florida, do not violate the Eighth and Fourteenth Amendments").

86. Jurek v. Texas, 428 U.S. 262, 273-74 (1976). "It thus appears that, as in Georgia and Florida, the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Id. See also* Gregg v. Georgia, 428 U.S. 153, 207 (1976). "No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines." *Id.* at 206-07.

87. *See* Jurek v. Texas, 428 U.S. 262, 276 (1976) (expedited review provided by the statute promotes rational and consistent sentencing); Gregg v. Georgia, 428 U.S. 153, 206 (1976) (appellate review serves as a check against random or arbitrary imposition of death penalty). *Cf.* Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (mandatory penalty afforded no opportunity for judiciary to check arbitrary and capricious exercise of sentencing power). *See generally*, Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979).

88. 454 A.2d at 960.

89. *Id. See, e.g., Proffitt*, 428 U.S. at 250-51. *See* Hubbard, Burry & Widener, *A "Meaningful" Basis for the Death Penalty: the Practice Constitutionality, and Justice of Capital Punishment in South Carolina*, 34 S.C.L. REV. 391, 524 (1982) (although appellate review is not explicitly required by the United States Supreme Court, its decision implicitly suggests such a requirement). *See also* Note, *The Indiana Death Penalty: An Exercise in Constitutional Futility*, 15 VAL. U.L. REV. 409, 430 (1981).

90. 428 U.S. 153 (1976).

91. *Id.* at 198, 207. The joint opinion of Justices Stewart, Powell, and Stevens has since been interpreted as the controlling opinion in the 1976 death penalty cases. *See* Ledewitz, *The Requirement of Death: Mandatory Language in the Pennsylvania Death Penalty Statute*, 21 DUQ. L. REV. 103, 119 (1982).

92. 428 U.S. at 223 (White, J., concurring). Justice White was joined by Chief Justice Burger and Justice Rehnquist in his concurrence.

The Georgia scheme requires that the reviewing court determine three sentencing issues in addition to its ordinary appellate review.[93] First, the court must determine whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.[94] Second, it must independently determine whether the evidence supports the finding of a statutory aggravating circumstance.[95] And finally, the court must decide whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases.[96] Of these three statutory duties imposed on the appellate court, the third, commonly referred to as proportionality review, was perceived by the 1976 plurality as the most important safeguard against the constitutional infirmities identified in *Furman*.[97]

Proportionality review requires the appellate court to review the penalties that were imposed in prior similar cases in order to determine whether the sentence of death in the case under review is excessive or disproportionate, considering both the crime and the defendant.[98] In *Gregg*, Justice Stewart stated that the Georgia appellate review procedures provided additional assurance that if juries were generally not imposing death penalties for certain kinds of murders, no sentence of death would be carried out on a defendant similarly situated.[99]

In contrast, although the Florida capital sentencing statute[100] did not mandate a specific form of review, the same plurality upheld the facial constitutionality of the law in *Proffitt v. Florida*.[101] In *Proffitt*, the Justices noted with approval that the Florida state court had interpreted its appellate role to include proportionality review.[102] And in *Jurek v. Texas*,[103] the Court merely presumed that the Texas statutory provision for prompt judicial review

93. *Gregg*, 428 U.S. at 167, 204 (citing GA. CODE ANN. § 27-2537(c) (Supp. 1975)).

94. 428 U.S. at 167.

95. *Id.*

96. *Id.*

97. Justice Stewart stressed that "[i]n particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by an aberrant jury." 428 U.S. at 206.

98. *Id.* at 223.

99. *Id.* at 206.

100. FLA. STAT. ANN. § 921.141(4) (West Supp. 1983).

101. 428 U.S. 242, 253 (1976).

102. *Id.* at 251. (quoting State v. Dixion, 283 So. 2d 1, 10 (Fla. 1973)) ("If a defendant is sentenced to die, this court can review that case in light of the other decisions and determine whether or not the punishment is too great").

103. 428 U.S. 262 (1976).

would promote evenhanded, rational, and consistent sentencing.[104] The *Jurek* Court failed to define the exact parameters of appellate review.[105]

Death penalty cases decided by the United States Supreme Court after 1976, and up to the time of the Pennsylvania Supreme Court's decision in *Zettlemoyer*, did not diminish the importance of conducting proportionality review.[106] Four death penalty cases decided by the United States Supreme Court[107] since *Zettlemoyer*, however, may affect the quality of proportionality review in future cases.[108]

In the first of these decisions, *Zant v. Stephens*,[109] the Court affirmed the sentence of death imposed on Stephens despite the fact that one aggravating circumstance relied on by his sentencing jury was held unconstitutionally vague by the Georgia Supreme Court while his appeal was pending.[110] In affirming the judgment of sen-

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104. *Id.* at 276. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071(f) (Vernon 1981 and Supp. 1982).

105. 428 U.S. at 276.

106. *See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977), where a death sentence was vacated as disproportionate to the offense of rape. Justices White, Stewart, Blackmun, and Stevens, announcing the judgment of the Court, expanded the scope of comparative review to include legislative judgments and jury sentencing patterns on a nation-wide basis in addition to comparing the penalty available in Georgia for rape with the lesser penalties available for an intentional murder, absent aggravating circumstances. *Id.* at 593-94, 600. Justice Powell concurred in the judgment because the penalty was excessive for the offense as it was actually perpetrated by Coker. *Id.* at 601 (Powell, J., concurring). The form of proportionality review conducted by the Justices in *Coker* produced a consistent result in Enmund v. Florida, 102 S. Ct. 3368 (1982) where the majority, in a five to four decision, rejected capital punishment for a defendant who did not kill or intend to kill during the course of a felony. Justice White's eighth amendment analysis included an objective evaluation of legislative enactments and statistical evidence; it also included an individualized assessment of the particular offender and the circumstances of the offense. *Id.* at 3377.

107. *See* California v. Ramos, 103 S. Ct. 3446 (1983); Barclay v. Florida, 103 S. Ct. 3418 (1983); Barefoot v. Estelle, 103 S. Ct. 3383 (1983); Zant v. Stephens, 103 S. Ct. 2733 (1983).

108. In each of these cases the sentencer was permitted to consider nonstatutory aggravating circumstances, which were not found by the reviewing courts to have produced an unconstitutional arbitrary sentencing decision. *See, e.g., Ramos*, 103 S. Ct. at 3460 (instruction informing jury of the Governor's power to commute a life sentence not prohibited by federal constitution); *Barclay*, 103 S. Ct. at 3424 ("[I]t is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing"); *Barefoot*, 103 S. Ct. at 3400 (expert may testify in response to hypothetical questions regarding defendant's propensity for committing violence in future); *Zant*, 103 S. Ct. at 2743 (jury is entitled to consider the evidence regardless of whether it is designated as a statutory aggravating circumstance).

109. 103 S. Ct. 2733 (1983).

110. *Id.* at 2738. *See* Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976) (statutory language, "a substantial history of serious assaultive criminal convictions," found to be un-

tence, the Court in *Zant* relied primarily on two provisions in the Georgia statute: (1) the limited function served by a jury finding of a statutory aggravating circumstance,[111] and (2) the appellate review procedures followed in a consistent manner by the Georgia Supreme Court.[112] The Court noted with approval the prescribed role of the Georgia sentencing jury which is required to differentiate, in a substantially rational way, the case before it from other cases in which the death penalty had not been imposed;[113] the Court also approved the role of the reviewing court in making a final determination as to whether a sentence is arbitrary, excessive, or disproportionate.[114]

In *Barclay v. Florida*,[115] a plurality of the Court reaffirmed the view that some form of appellate review is constitutionally required, but failed to clarify the precise dimensions of the state court's responsibility.[116] The issue in *Barclay* focused on the sentencing judge's inclusion of non-statutory aggravating circumstances and personal experiences in Nazi Germany in his determination of the sentence to be imposed.[117] In affirming the judgment, the plurality in *Barclay*, as did the majority in *Zant*, based its decision primarily on the function of the finding of an aggravating

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constitutionally vague by Georgia Supreme Court).

111. 103 S. Ct. at 2740 (aggravating circumstances merely narrow the category of persons convicted of murder who are eligible for the death penalty). *See also* Zant v. Stephens, 250 Ga. 97, 99, 297 S.E.2d 1, 3 (1982)("[t]he purpose of the statutory aggravating circumstance is to limit to a large degree, but not completely, the factfinder's discretion").

112. 103 S. Ct. at 2744. *See id.* at 2744 n.19. "In performing the sentence comparison required by [Ga.] Code Ann. § 27-2537(c)(3), this court uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed." 103 S. Ct. at 2744 n.19 (quoting Stephens v. State, 237 Ga. 259, 260, 227 S.E.2d 261, 263, *cert. denied*, 429 U.S. 986 (1976)).

113. 103 S. Ct. at 2744. The Court concluded that a finding of two aggravating circumstances provided for categorical narrowing of eligible recipients at the definitional stage of the process. *Id.*

114. *Id.*

115. 103 S. Ct. 3418 (1983).

116. Justice Rehnquist, joined by Chief Justice Burger and Justices White and O'Connor, approved the state's practice of examining the balance struck by the sentencing judge and then applying a harmless error analysis if the improperly considered aggravating circumstances could not possibly affect the balance. *Id.* at 3428. Justices Stevens, joined by Justice Powell, on the other hand, concurred in the judgment and expressed his view that the federal constitution requires the sentencer to limit its consideration exclusively to statutory aggravating circumstances. *Id.* at 3433 (Stevens, J., concurring).

117. *Id.* at 3422-23. The trial judge compared the defendant's racial motives with his own experiences in the Army during World War I and also considered Barclay's criminal record as an aggravating circumstance even though it was not among those enumerated in the statute. *Id. See* FLA. STAT. ANN. § 921.141(5) (West Supp. 1983).

circumstance[118] and the appellate review protection provided by the Florida statutory scheme.[119] In relying on appellate review, however, the Court failed to suggest how these personal experiences are to be assessed when the state court compares similar cases.[120]

During the 1984 term, the United States Supreme Court is expected to clarify the issue of proportionality review in *Pulley v. Harris*.[121] This case reached the United States Supreme Court after the Court of Appeals for the Ninth Circuit vacated the district court's denial of Harris' habeas corpus petition, and instructed the district court to grant the petition unless the California Supreme Court agreed to undertake proportionality review.[122] Since *Harris*, the Eighth Circuit has also considered the constitutional status of proportionality review in *Collins v. Lockhart*[123] and, as was done in *Harris*, deferred consideration on the merits of the petition in order to afford the Arkansas Supreme Court the opportunity to reconsider proportionality review.[124] The Eighth Circuit Court of Appeals deferred acting despite the fact that the Arkansas Supreme Court had expressly refused to consider comparative review on Collins' direct appeal.[125]

In contrast to other states where a substantial number of death sentences have been reviewed, the sentence imposed on Keith Zettlemoyer represents the first opportunity for the Pennsylvania

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118. 103 S. Ct. at 3425 ("whether Barclay's sentence must be vacated depends on the function of the finding of an aggravating circumstance . . . and on the reason why an aggravating circumstance is invalid").

119. The plurality stated that its decision was buttressed by the Florida court's practice of conducting proportionality review. *Id.* at 3428. Concurring in the judgment, Justice Stevens relied on the scope of appellate review provided for in the statute and also the procedure regularly followed by the Florida court. *Id.* at 3436-37 (Stevens, J., concurring).

120. In Barclay v. State, 343 So. 2d 1266, 1270-71 (Fla. 1977), the proportionality review conducted by the Florida Supreme Court was limited to an evaluation of disparate sentencing between Barclay and a co-perpetrator, but did not encompass other similar cases. *Id.*

121. 692 F.2d 1189 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 1425 (1983).

122. 692 F.2d at 1196.

123. 707 F.2d 341 (8th Cir. 1983).

124. *Id.* at 342.

125. *Id.* at 343. The law under which Collins was sentenced did not require that the court conduct any particular kind of review., *Id.* (citing ARK. STAT. ANN. § 41-4701 (Supp. 1973)). In contrast to Pulley v. Harris, 692 F.2d 1189 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 1425 (1983), and Collins v. Lockhart, 707 F.2d 341 (8th Cir. 1983), the federal courts generally have not been willing to reexamine the adequacy of a state court's procedure where some form of proportionality review has been conducted. *See, e.g.*, Moore v. Balcom, 709 F.2d 1353 (11th Cir. 1983); Spinkillink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) (emphasis on doctrine of non-interference), *cert. denied*, 440 U.S. 976 (1979).

Supreme Court to demonstrate its application of the appellate procedures required by the state's 1978 sentencing code.[126] Prior to *Zettlemoyer*, a sentence of death imposed pursuant to the 1978 law was before the court in *Commonwealth v. Story*,[127] but the sentence was vacated on the grounds that the statute was not applicable to a defendant who had committed a homicide in 1974 and was subsequently granted a new trial in 1978.[128] A comparison of the two cases suggests that the court in *Zettlemoyer* incorporated portions of Justice Larsen's dissenting opinion in *Story*, and applied his reasoning frequently in response to the constitutional issues raised by the appellant.[129]

This was not the case, however, in its approach to proportionality review. The *Zettlemoyer* court, in contrast to the court in *Story*, found that some form of comparison is constitutionally required in order to establish that Zettlemoyer's death sentence was not excessive or disproportionate.[130] The court explained that the pool of cases available for comparison is limited to those which have been prosecuted since the enactment of the 1978 law and which have reached a jury verdict at the trial level.[131] No further guidance was provided by the *Zettlemoyer* court, and it appears that no cases were included for comparison in which a life sentence had been imposed.[132] The majority opinion also suggests that in screening the cases available for comparative review, the court is interested only in discovering whether any other homicide in which

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126. *Cf.* Commonwealth v. Zettlemoyer, 454 A.2d 937, 941 n.1 (Pa. 1982), *cert. denied*, 103 S. Ct. 2444 (1983).

127. 497 Pa. 273, 440 A.2d 488 (1981).

128. *Id.* at 282, 440 A.2d at 492. At his first trial, a sentence of death was imposed pursuant to the act later found to be unconstitutional in Commonwealth v. Moody, 476 Pa. 223, 382 A.2d 442 (1977), *cert. denied*, 438 U.S. 914 (1978). *See* Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155 (1977) (a new trial was required where the Commonwealth was permitted to introduce improper and prejudicial evidence). *See also supra* note 16 and accompanying text.

129. *See, e.g., Zettlemoyer*, 454 A.2d at 960 (quoting *Story*, 497 Pa. at 297-98, 440 A.2d at 500-01) (deference to legislative judgment in selecting appropriate punishment)); *see also Zettlemoyer*, 454 A.2d at 963 (quoting *Story*, 497 Pa. at 311, 440 A.2d at 507 (burden of proof constitutionally allocated)).

130. 454 A.2d at 961. In *Story*, Justice Larsen acknowledged that comparative review was not possible since *Story* was a case of first impression in the Commonwealth. *See* 497 Pa. at 314-15, 440 A.2d at 509.

131. 454 A.2d at 962. *See supra* note 44.

132. No special procedural mechanism has been established by the supreme court to collect data for comparative review. In contrast, the Georgia statute reviewed in Gregg v. Georgia, 428 U.S. 153 (1976) provided for the employment of additional staff to assist the court in collecting and compiling data on capital cases decided since 1970 in which a death penalty had been imposed. *Id.* at 212 and n.3. *See supra* note 93.

a death penalty has been imposed also involved the killing of a prosecution witness.[133] After learning that Mack Truesdale had killed a prosecution witness and had received a sentence of death, the court perfunctorily concluded that Zettlemoyer's sentence was not disproportionate to the penalty imposed in similar cases.[134] The court made this comparison notwithstanding the fact that Truesdale's victim had witnessed another murder that Truesdale had committed and Truesdale also had been convicted previously for an offense punishable by life imprisonment or death.[135]

In addition, the *Zettlemoyer* court failed to address any mitigating circumstances, even though the parties stipulated that at least one existed in this case.[136] The court chose as its sole criterion one like circumstance surrounding the offense, namely, the fact that each victim intended to testify for the prosecution.[137] The *Zettlemoyer* court ignored the fact that the jury in *Truesdale* found two additional aggravating circumstances and no mitigating circumstances, and the fact that the sentencing code expressly provided for the imposition of the death penalty in Truesdale'e case.[138]

The purpose of proportionality review is to determine whether the death penalty is being imposed capriciously on a particular class of defendants.[139] Although the United States Supreme Court has not established clear guidelines for identifying the members of a class, the plurality opinions expressed in *Gregg* and *Woodson v. North Carolina* are not supportive of the broad base utilized in

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133. 454 A.2d at 961-62.

134. 454 A.2d at 962 and n.26a. *See supra* note 45.

135. 454 A.2d at 962 and n.26a. *See supra* note 45 for the statutory aggravating circumstances.

136. 454 A.2d at 969 (Roberts, J., dissenting) (the defendant had no significant history of prior criminal convictions). *See supra* note 67 and accompanying text.

137. 454 A.2d at 962. "The only case that our research indicates has proceeded to a jury verdict under § 9711(d)(5) of the Act of September 13, 1978, has also resulted in a sentence of death." In contrast, Justice Larsen stated that "[w]e have reviewed in this case, as we will in the future, the entire record and will evaluate 'similar cases' on the basis of the evidence presented as to mitigating circumstances." *Id.*

138. *See* 42 PA. CONS. STAT. § 9711(c)(iv) (1982), *supra* note 23. *See also* Ledewitz, *supra* note 91, at 104 (if certain conditions are satisfied the sentencer in some states is required to return a sentence of death).

139. *See Gregg*, 428 U.S. at 224 (White, J., concurring) ("if Georgia Supreme Court properly performs the task assigned to it, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside"). *See also id.* at 2006 ("[i]f a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death").

Zettlemoyer.[140] Furthermore, the United States Supreme Court has emphasized repeatedly that meaningful appellate review requires that the reviewing court focus on the individualized characteristics of the offender, as well as the circumstances of the offense.[141] The court in *Zettlemoyer* failed to include the characteristics distinguishing Zettlemoyer and Truesdale in its comparative review procedure.[142] And finally, the fact that the jury had no choice but to sentence Truesdale to die suggests that the proportionality review conducted in *Zettlemoyer* was not in compliance with the United States Supreme Court rulings in 1976.

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140. In *Gregg* the plurality noted with approval that the Georgia Supreme Court had found and relied on several other cases in which the victim had also been a witness to a robbery. 428 U.S. at 218. In addition, the *Gregg* plurality affirmed the Georgia court's inclusion of pre-*Furman* cases when no similar cases were available for comparison immediately after the statutory enactment. *Id.* at 205 n.56. Also approved in *Gregg* was the utilization of appealed murder cases where a life sentence had been imposed. *Id. See also* Woodson v. North Carolina, 428 U.S. at 304 (a process that treats all persons convicted of a designated offense as though they were part of a faceless or undifferentiated mass does not comport with the concept of human dignity which is the basic concept underlying the eighth amendment).

141. *See supra* note 87.

142. *See supra* notes 135-36 and accompanying text.